IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-606

FRANCIS LEO MARKS,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Sixth Circuit

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INTRODUCTORY STATEMENT

The Petitioner, Francis Leo Marks, respectfully petitions this Honorable Court for a Writ Of Certiorari to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit filed in this proceeding on July 21, 1977, reversing orders of the United States District Court for the Southern District

of Ohio suppressing evidence in this federal criminal prosecution and remanding the case.

The Opinion of the United States Court of Appeals for the Sixth Circuit is appended, bound with this Petition, and marked Appendix "A".

Petition for Rehearing was denied by the United States Court of Appeals for the Sixth Circuit on August 29, 1977, and the Order denying the Petition for Rehearing is appended, bound with this Petition, and marked Appendix "B".

This Honorable Court's Order extending Petitioner, Francis Leo Marks', time to file his Petition for Writ of Certiorari to October 28, 1977, is appended, bound with this Petition, and marked Appendix "C".

JURISDICTION

The Opinion and Order of the Sixth Circuit was filed on July 21, 1977. A timely Petition for a Rehearing was denied by the Sixth Circuit on August 29, 1977, petitioner's time to file his Petition for Writ of Certiorari was extended to

and including October 28, 1977, by Associate Justice Potter Stewart of this Honorable Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Petitioner states that Consolidation Coal Company, a co-appellee, in Case No. 76-2518, in the Court of Appeals for the Sixth Circuit, has filed a Petition for a Writ of Certiorari in this case; and this petitioner has been informed that Robert Lasick, Richard Schrickel, and Raymond Zitko, co-appellees, in Case Nos. 76-2519, 76-2520 and 76-2522, respectively, in the Court of Appeals for the Sixth Circuit, are also filing Petitions for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the less stringent showing of probable cause required to obtain search warrants to conduct routine administrative compliance inspections is sufficient under the Fourth Amendment to justify the issuance of warrants to conduct searches and seizures in offices where the purpose of the searches and seizures is the discovery of

evidence of suspected criminal violations of the Federal Coal Mine Health and Safety Act of 1969?

2. Whether a federal coal mine inspector's statutory right of entry into a "coal mine" for the purposes of making inspections and investigations gives rise to the right to obtain an administrative warrant to force entry into petitioner's private offices and to search for and seize records and other personal property contained therein?

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause?

4. Whether a corporate supervisory employee has standing as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e) to challenge the searches and seizures of evidence from Consolidation Coal Company's six corporate offices where said employee is: (1) the chief environmental technician and is the immediate supervisor of each individual environmental

technician; (2) as chief environmental technician is responsible for maintaining all of said corporation's respirable dust records, which records were the object of the government's search and seizure; and (3) as chief environmental technician conducts corporate business in each of the corporate offices searched?

5. Is the government entitled to an evidentiary hearing pursuant to Federal Rule of Criminal Procedure 41(e), when it never requests such a hearing, nor does it challenge the factual allegations of the person asserting his position as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition. The sections involved are:

Section 103 (30 U.S.C. §813), entitled "Inspections and Investigations";

Section 108 (30 U.S.C. §818), entitled "Injunctions"; and

Section 108 (30 U.S.C. §819, entitled "Penalties".

STATEMENT OF THE CASE

On May 21, 1974, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants[1] relating to various offices in Consolidation Coal Company's (Hereinafter: Consol)

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1. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted in the Appendix to co-petitioner's, Consolidation Coal Company's, Petition for a Writ of Certiorari in this case at Pages 49a - 95a.

Central Division in Eastern Ohio.

All of the warrants but one were based upon the affidavit of William E. Holgate, an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey, a federal coal mine inspector.

The Holgate and Jeskey affidavits referred to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in the respirable dust sampling program at certain mines of Consol. The affidavits recited that evidence of violations of criminal provisions of the Federal Coal Mine Health and Safety Act of 1969 was believed to be concealed in the offices to be searched.

The warrants were executed in a surprise raid on May 22, 1974, by federal inspectors who had been appointed special deputy marshals. There was no prior demand upon petitioner or Consol for the desired materials.

In the searches and seizures conducted pursuant to the warrants, the deputy marshals confiscated from Consol's private offices and petitioner's private office a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets or drawers, and a set of scales.

In the Summer of 1975, indictments were returned against petitioner, Consol and seven of Consol's current or former employees charging numerous separate violations of two criminal provisions of the Coal Mine Health and Safety Act, as well as two counts of criminal conspiracy. The indictments were based, entirely or primarily, upon the documents seized in the May 1974 raid and the fruits of such seizures.

Accordingly, Consol filed a motion to suppress various items of evidence taken from certain buildings and mines belonging to Consol. Said property was subsequently found by the district court to be taken by means of invalid and defective search

warrants and said evidence was ordered by the Court on June 10, 1976, to be suppressed as to Consol.

The district court's order of June 10, 1976, granted Consolidation Coal Company's motion to suppress the evidence seized from the following locations, to-wit:

(1) The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

(2) The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio;

(3) The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;

(4) The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale Harrison County, Ohio;

(5) The mine office, Oak Park No. 7 coal mine of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

(6) The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio.

However, the district court ruled that each individual's motion to suppress was denied without prejudice, because said defendants had to demonstrate their standing as a "person aggrieved" by the government's searches and seizures. (Appendix 20a and 21a) Thus, on July 14, 1976, petitioner filed his Motion To Suppress and Memorandum In Support Of Motion To Suppress By Defendant Francis Leo Marks.

In said Motion To Suppress and Memorandum in Support thereof petitioner set forth the following facts, to-wit:

(1) Defendant Marks was the Chief Environmental Technician of Consol's Midwest Region and in such capacity was the immediate supervisor of each individual Environmental Technician;

(2) Defendant Marks was responsible for the maintaining of all respirable dust records;

(3) Defendant Marks was present during the search and seizure at the Georgetown office;

(4) Defendant Marks visited each mine office regularly and conferred with the environmental technician at each mine office; and

(5) That the evidence seized was to be used against Defendant Marks and was evidence of an essential element of the crimes with which this defendant was charged.

The government further admitted the following facts as to petitioner in its Memorandum filed with the district court on September 14, 1976, opposing Petitioner Marks' Motion To Suppress, to-wit:

(1) Marks was the Chief Environmental Technician for Consol's Midwest Region;

(2) That Marks "had supervisory responsibility over the other technicians, their papers and their offices";

(3) That Marks had standing to contest the legality of the search of his office at Georgetown, Ohio;

(4) That Marks was present at his office on May 22, 1974, the day said offices of Consol were searched.

Further, the government neither contested any factual allegation of Petitioner, nor moved for an evidentiary hearing in this matter.

On October 4, 1976, the Court granted Petitioner's Motion To Suppress said evidence.

Respondent appealed under the provisions of 18 U.S.C. §3731, certifying that the suppressed

evidence was "a substantial proof of the charge[s] pending against the defendant[s]". On July 21, 1977, the Sixth Circuit reversed and remanded, a plurality of the panel holding, sua sponte, that the administrative standard of probable cause announced in Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967) applied in this case and that the affidavits satisfied this less stringent test. Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of Aguilar and Spinelli, but found "certain issues relating to administrative searches and seizures covered [in the majority opinion] ...sufficiently troublesome...that... their resolution [should be saved] until the case arises which demands it". (Appendix 18a)

Further, the Sixth Circuit held in footnote 7 of its Opinion (Appendix 4a) that "The issue as to standing of Marks and Zitko to challenge

the searches is mooted by our disposition of their appeals on other grounds". Therefore, the Sixth Ciruit never passed on the standing question of this Petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner's, Co-Petitioner, Consolidation Coal Company, has filed a Petition for a Writ of Certiorari in this case and in said Petition has thoroughly and adequately discussed why said Writ should issue on the first three questions presented in this case. Therefore, Petitioner Marks will not address himself to the first three questions presented, but rely upon and incorporate by reference into this Petition the reasons advanced by Consolidation Coal Company for granting its Writ of Certiorari in this case. However, this Petitioner will present to this Honorable Court his arguments as to Questions Presented Four and Five, which concern Petitioner's standing to challenge said searches at the six private mine offices under his supervision and control.

Further, we believe this case furnishes the Court an opportunity to clarify its decision in Brown v. U.S., 411 U.S. 223 (1973), as to the requirements necessary for a person to assert that he is a "person aggrieved" by a search and seizure, when he is a corporate supervisory employee and his office and the other mine offices that he visits in the regular course of his employment and in which he conducts corporate business are searched and records which are his responsibility for maintaining are seized by special federal marshals.

ARGUMENT

Petitioner submits that he is a "person aggrieved" within the purview of the Fourth Amendment and Federal Rule of Criminal Procedure 41(e) and that he had a reasonable expectation of privacy in said six mine offices and that said privacy was invaded by the illegal intrusion of the government.

A review of the facts of the leading cases discussing standing of persons aggrieved under

Federal Rule of Criminal Procedure 41(e) illustrates clearly that Petitioner was a person aggrieved and, therefore, had standing to contest the searches and seizures of evidence at the above cited six mine offices.

In Jones vs. U.S. 362 U.S. 257 (1960) which is still considered a leading "standing" case, the status of a guest in the search and seizure area was before this Court. Jones was a guest in an apartment when an unlawful search disclosed narcotics, possession of which is a crime. Although he denied any connection with the narcotics, the Court, nevertheless, held that the exclusionary rule protected him also since Federal Rule Of Criminal Procedure 41(e), as redefined, covered "anyone legitimately on the premises where a search occurs". Jones, it was held, was "a person aggrieved by an unlawful search and seizure" under Federal Rule Of Criminal Procedure 41(e) and thus had standing to move to suppress the seized evidence.

The case of Mancusi v. DeForte, 392 U.S. 364 (1968) is directly in point with the case at bar. The facts of Mancusi v. DeForte, supra, are briefly, as follows: Petitioner DeForte was an officer in the Teamsters Local Union No. 266 and his office which was shared with other union officials was illegally searched by New York state officials. The Court per Justice Harlan, held that DeForte had standing to contest the search of the entire union office; even though, said office consisted of one large room which he shared with several other union officials. Further, the Court stated the following on this point, to-wit:

> It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody. It is, of course, irrelevant that the

> Union or some of its officials might validly have consented to a search of the area where the records were kept, regardless of DeForte's wishes, for it is not claimed that any such consent was given, either expressly or by implication. (392 U.S. 369-370)

In addition, the Court in Mancusi v. DeForte, supra, at p. 368, cites Katz v. U. S., infra, for the following proposition of law, to-wit:

> The Court's recent decision in Katz v. United States, 389 U.S. 347, 19 L Ed 2d 576, 88 S. Ct. 507, also makes it clear that capacity to claim the protection of the (Fourth) Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U.S. at 253, 19 L Ed 2d at 582. The crucial issue, therefore, is whether in light of all the circumstances, DeForte's office was such a place.

This Court then held that DeForte's shared union office was a place where he had a reasonable expectation of privacy.

The government concedes that Defendant Marks was at his office in Georgetown when said searches and seizures took place, therefore, the Court's holding in Jones and DeForte gives him standing to contest the search and seizure at the Georgetown General Offices of Consol.

In Brown v. U.S., 411 U.S. 223, 229, (1973) this Court laid down the following general rule as to standing:

> "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a)were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

Thus, Petitioner submits that Brown v. U. S., supra, gives him "standing" not only to challenge the illegal search and seizure of his private office at Georgetown, but also, "standing" to challenge the illegal searches and seizures at all of the six mine

offices listed above; since, (1) he, as Chief Environmental Technician visits each of said six locations, and conducted environmental business therein; (2) he is responsible as Chief Environmental Technician for all of Consol's respirable dust records; and (3) he was charged by the government with conspiring with the individual technicians, the Safety Director and Consol. The charges were defrauding the government and violating the Federal Coal Mine Health and Safety Act. Thus, Defendant Marks as a co-conspirator was charged by the government with the possession of evidence, mere possession of which was evidence of an offense pursuant to the government interpretation of the Coal Mine Health and Safety Act; ie., possession of exposed respirable dust cassettes and their mine data cards. Accordingly, Petitioner has standing to challenge the searches and seizures at all of the above cited offices.

Further, the government argued in the Sixth Circuit, that the district court erred in not having an evidentiary hearing as to Petitioner's standing, even though, the government never requested such a hearing or contested the factual allegations of Petitioner.

Federal Rule of Criminal Procedure 41(e) provides in pertinent part, as follows:

> "...The judge shall receive evidence on any issue of fact necessary to the decision of the motion."

The above quoted language has been construed by the courts to require an evidentiary hearing when there are contested facts and a request is made for such hearing. (Emphasis added.) Thus, in U.S. v. Ledesma, et al., 499 F.2d 36, at 39 (1974) the court citing Cohen v. U.S., infra, stated the applicable law on this issue, as follows:

> "[1] There was no predjucial error in refusing to grant Quiroz-Santi an evidentiary hearing on his motion to suppress. Rule 41(e), Federal Rules of Criminal Procedure, provides that the court 'shall receive evidence on any issue of fact necessary to the decision of the motion.' Evidentiary hearings need not be set as a matter of course, but if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required. Cohen v. United States, 378 F.2d 751, 760-761 (9th Cir.) cert. denied, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed. 2d 215 (1967)."

Thus, in order for the government to be entitled to an evidentiary hearing it must (1) file a motion requesting such a hearing and (2) state in said motion with specificity the contested issues of fact, which are going to be the subject of said evidentiary hearing.

However, in the case at bar, the government has neither requested an evidentiary hearing nor contested any facts asserted by Petitioner.

Instead, the government has chosen to argue the law to be applied to the facts submitted by this Petitioner.

Accordingly, the district court having no factual dispute before it as to the activities of Petitioner at each of the above cited environmental offices of Consol properly held that Petitioner had standing to suppress the items seized from said locations.

CONCLUSION

Petitioner respectfully submits that for the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari filed in this Court by Petitioner's Co-Petitioner, Consolidation Coal Company, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Nos. 76-2518, 76-2519, 76-2520,
76-2521, 76-2522

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. CONSOLIDATION COAL COMPANY, a corporation; ROBERT LASICK, RICHARD SCHRICKEL, FRANCIS LEO MARKS, RAYMOND ZITKO, individuals, *Defendants-Appellees.*	APPEALS from Memoranda and Orders of the United States District Court for the Southern District of Ohio.

Decided and Filed July 21, 1977.

Before: CELEBREZZE and ENGEL, Circuit Judges, and CECIL, Senior Circuit Judge.

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. ENGEL, Circuit Judge, (p. 15) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge. These appeals arise in the context of a federal prosecution brought against Consolidation Coal Company and eight of its employees for criminal violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* The Government invokes 18 U.S.C. § 3731 to challenge two interlocutory orders of the district

court granting evidentiary supression and return to defendant Appellees of all materials seized in May, 1974, during simultaneous searches of five Company coal mine offices and its general office in Ohio. These searches were authorized by six warrants issued by a federal magistrate.[1] In finding the requisite probable cause, the magistrate relied upon two affidavits sworn to by agents of the United States Department of the Interior. The affidavits recited an account by an unnamed, ex-employee of systematic efforts by the Company to evade the respirable dust concentration standards and monitoring requirements imposed by Section 842 of the Act.[2]

The confidential informant claimed that the Company caused all ambient atmospheric dust samples taken pursuant to Section 842(a) to be weighed in its own laboratory prior to submitting them to the Secretary of the Interior for analysis. If a legitimate sample were found to offend the mandatory federal standard, an artificially "clean" [low] sample, prepared by Company technicians under controlled conditions, would be substituted and the authenticating documentation altered to conform.[3] Such false reporting, if knowingly participated

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[1] Nine warrants were, in fact, issued and nine searches performed. No evidentiary materials were seized at one location and the Government voluntarily returned to the Company the fruits of two other searches.

[2] Section 842 represents Congress' effort to remove one of the most serious hazards of coal mining. Prolonged inhalation of excessive concentrations of respirable coal dust is known to cause pneumoconiosis, a chronic lung disease commonly known as "black lung." In its advanced form pneumoconiosis leads to severe disability and premature death.

[3] Sampling pursuant to Section 842 demands that certain miners wear a small, plastic air filtering device called a "cassette" and an air pump while working a normal production shift in the mines. The pump sucks air into the cassette, and filter paper inside captures the respirable dust particles. The resulting sample approximates the concentration of dust present in the mine atmosphere to which the miner bearing the cassette is exposed. When the miner completes his shift he turns the equipment over to a mine official and signs or initials a "mine data card" which identifies the miner, the date, the section of the mine in which the sample was taken, and the miner's occupation code. The mine official also signs the card. Each cassette is uniquely associated with its respective mine data card by

in by all Appellees, would violate three criminal provisions of the Act, 30 U.S.C. § 819(b), (c) and (d).[4]

In September, 1975, the Appellees and others were named in a 178 count federal indictment charging them with numerous violations of 30 U.S.C. § 819 as well as two counts of conspiracy. In October, the Company moved to suppress the evidentiary fruits of the searches of its six offices.[5] The district court responded to the criminal nature of the proceeding, the key role played by the confidential informant, and the criminal focus of the original investigation[6] by treating this motion as an invitation to assess the constitutional sufficiency of the Government's warrant affidavits under the stringent, two-pronged test of the reliability of a criminal "tip" articulated in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969). The court concluded that the two affidavits, even when read in concert, imparted information which was conclusory, potentially stale, and otherwise insufficient to establish probable cause to believe that Appellees had committed or were in the process of committing criminal acts. Therefore, in June, 1976, the district court granted the Company's motion to suppress.

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a number which has been stamped on both by the manufacturer. To alter legitimate samples it is necessary to either physically open a cassette and remove a portion of the dust or to "void" the cassette and substitute a bogus one. The latter procedure would entail forging the miner's signature on the mine data card. The informant implicated the Company in both forms of deception.

[4] Section 819(b) subjects an operator who "willfully violates a mandatory health or safety standard * * *" to a maximum penalty of $25,000. fine or one year in jail or both. Section 819(c) extends this liability to any director, officer or agent of such corporation "who knowingly authorized, ordered, or carried out such violation." Section 819(d) imposes a maximum penalty of $10,000. fine and/or six months in jail for making "any false statement, representation, or certification in any application, record, report, plan or other document" filed or maintained pursuant to the Act.

[5] A substantial volume of records and documents were seized [including a number of metal file cabinets and file card drawers containing allegedly relevant data] as well as a number of sampling cassettes.

[6] This criminal orientation was dramatized by the fact that the mine safety inspectors who executed the warrants were deputized as Special Deputy United States Marshals.

Subsequently, seven of the individual defendants, including the individual Appellees herein, filed motions to suppress the evidence seized from their respective Company offices. Only Appellees Marks and Zitko asserted 4th amendment standing as persons aggrieved by all six intrusions and moved for suppression of all of the seized evidence despite the fact that only a portion of the materials were uncovered in their private offices.[7] In October, 1976, the district court granted the suppression motions of all the individual Appellees. At this point the court had already denied a Government motion for reconsideration of its adverse June ruling. The Government seasonably perfected the instant appeals which were consolidated on motion for oral argument and disposition.

The Government advances three alternative rationales for reversing the district court's orders: 1) the searches were constitutionally permissible without warrants under Section 813(a)(4) which authorizes "frequent inspections and investigations in coal mines * * * for the purpose of * * * determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under [the Act]," *see Yougiogheny and Ohio Coal Company* v. *Morton*, 354 F. Supp. 45 (S.D. Ohio 1973); 2) the district court improperly undertook a *de novo* review of the quantum of probable cause supplied by the Government's affidavits without due deference to the judgment of the magistrate, *United States* v. *Giacalone*, 541 F.2d 508, 513 (6th Cir. 1976); 3) even if the affidavits are found to be constitutionally infirm, the exclusionary rule should not apply here because the Government inspectors acted in good faith on the authority of facially valid warrants.

We reject out of hand the Government's first contention. The *Yougiogheny* decision stands for the proposition that only inspections of the *underground* portions or "active workings"

[7] The issue as to the standing of Marks and Zitko to challenge the searches is mooted by our disposition of their appeals on other grounds.

of coal mines may be performed without search warrants under Section 813(a) and (b). It expressly excludes from the purview of its holding warrantless searches of offices on the mining property in which "[t]he mine operator • • • does have a general expectation of privacy." 354 F. Supp. at 51 n. 5. In addition, nothing in the Act authorizes the wholesale seizure of records which took place here. Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant:

> It is implicit • • • that the right to inspect does not carry with it the right, without warrant in the absence of arrest, to reach that which is to be inspected by a resort to self-help in the face of the owner's protest.
>
> *Hughes* v. *Johnson*, 305 F.2d 67, 69 (9th Cir. 1962).

The Government wisely recognized its constitutional obligation to obtain prior judicial approval before entering the six mine offices to locate and seize allegedly incriminating records subsumed within Company files.

We agree with the Government's second contention that the scope of the district court's review of the two supporting affidavits was overly broad. However, rather than attribute this to the court's failure to honor the magistrate's original finding of probable cause, we see it as reflecting reliance upon an excessively demanding standard of review which ignored the administrative concerns which prompted the original warrant requests. This finding leads us to reverse the two suppression orders and to remand for further proceedings. We therefore need not reach the Government's third contention regarding the scope of the exclusionary rule.

The Government asserts that its affidavits will withstand an *Aguilar-Spinelli* analysis if read in a common sense rather than hypertechnical fashion. *United States* v. *Ventresca*, 380 U.S. 102 (1965), *United States* v. *Hodge*, 539 F.2d 898, 903 (6th

Cir. 1976). Although we tend to agree, we are pursuaded that there are more compelling grounds for reversal than a mere misreading of the affidavits. In the absence of guidance from the case law, the district court treated the contested search warrants as implements of a conventional criminal investigation. In its memorandum opinion and order of September 2, 1976, denying the Government's motion for reconsideration, the court rejected the suggestion that the searches involved intrusions which fall within the scope of "inspections and investigations" authorized by Section 813(a). We believe that this conclusion was erroneous as a matter of law. It justified the overly strict scrutiny of the search warrant affidavits which pursuaded the court to grant Appellees' motions to suppress.

From our reading of the record and the enforcement provisions of the Act, we conclude that the searches in issue were essential components of a single compliance inquiry authorized by Section 813(a). They involved reasonable intrusions which were "routine"[8] in scope if not in motivation. Their regulatory character was not diminished by the fact that they were predicated upon overt criminal suspicion rather than administrative necessity. We hold that the district court erred in refusing to sustain these searches upon a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967).

We begin with the premise that the nature of the Act entitles it to expansive interpretation:

> Since the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a 'narrow or limited construction is to be eschewed.' (citation omitted)

[8] Routine in the sense that they were permissible under the Act rather than that they were historically a common enforcement practice.

Freeman Coal Mining Co. v. *Interior Board of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974); *accord, Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398, 405 (D.C. Cir. 1976).

Viewed in this light, Section 813 bespeaks a congressional intent to permit federal inspectors to enter coal mine offices *in the normal course* and to *independently* access and review (if not seize) pertinent indicia of compliance with the Act. Section 813(a) specifically empowers authorized representatives of the Secretary to carry out both "inspections and investigations in coal mines." Congress' inclusion of the term "investigation" reflects an intent to condone more intrusive, systematic invasion of commercial privacy than that associated with a mere inspection. It implicitly sanctions purposeful efforts to corroborate or disprove specific allegations of infraction.

Significantly, Section 813(a) does not restrict the purpose of investigations to ascertaining the causes of mine accidents. They may aid in "determining whether or not there is compliance with the mandatory health or safety standards" promulgated under the Act. 30 U.S.C. § 813(a). In marked contrast to the comparable provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a)(2), Section 813 (a) does not catalogue the permissible objects of inspection. We interpret this omission as evidence of congressional intent to endow mine safety inspectors with the broadest possible discretion.

It follows that business records and other paraphernalia, which are maintained pursuant to the Act, are appropriate targets for periodic federal scrutiny. *Youghiogheny and Ohio Coal Company* v. *Morton, supra* at 51 n. 5. In the instant case, these materials constitute the veritable life blood of a statutory scheme which contemplates responsible, self-monitoring of working conditions by mine operators. The efficacy of the respirable dust control program, 30 U.S.C. § 842, is

entirely dependent upon the integrity with which operators sample, record and report these conditions. We see no other realistic way to ensure compliance short of direct, on-site access to these records as they are *internally* maintained.

Even in the absence of warrants, the investigators had the right to enter the six company facilities which were searched. Section 813(b)(1) provides a "right of entry to, upon, or through any coal mine" for the purpose of making any inspection or investigation mandated by the Act. The term "coal mine" is broadly defined in Section 802(h) to include "*all* structures • • • placed upon • • • or above the surface [of land] used in, or to be used in, or resulting from the work of extracting • • • coal."[9] All six offices, including the Company's general office, were situated in close proximity to working mines and were instrumental in the administration of ongoing mine operations. They were, therefore, part of coal mine premises within the meaning of the Act and subject to entry by representatives of the Secretary at reasonable times.

Although the Act does not expressly empower investigators to use self-help to locate objects of their inquiry which may be intermingled in mine operators' files, neither does it establish formal demand as a condition precedent to accessing them.[10] Voluntary delivery upon request may be the procedure of choice; it may, in fact, be constitutionally imperative in the absence of a search warrant. *See Youghiogheny and Ohio Coal Company* v. *Morton, supra* at 51 n. 5. However, Section 813 (a) confirms that Congress wished to foreclose any opportunity, potentially available to mine operators, to bias the inspection process:

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[9] Where Congress wished to limit the environmental scope of inspection, it did so in express terms. Thus the "spot inspections" authorized by Section 842(g) may only be performed in the "active workings" of mines, a term which we interpret to exclude mine offices.

[10] The Secretary's subpoena power under 30 U.S.C. § 813(d) is limited to compelling the production of records and witnesses at public hearings.

> In carrying out the requirements of clauses • • • (4) [inspections and investigations for purposes of compliance review] • • •, no advance notice of inspection shall be provided to any person.

Only by fully exploiting the element of surprise can potentially unscrupulous mine operators be deterred from engaging in systematic evasion of the Act:

> Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.
>
> *United States* v. *Biswell*, 406 U.S. 311, 316 (1972)

This secrecy requirement would be reduced to a hollow formalism if we were to read into the Act the obligation to make an access demand incident to every "suprise" inspection or investigation. Once an investigator has requested that sensitive data be voluntarily disclosed, the mine operator is immediately forewarned in spite of the confidentiality of the inspection schedule. This affords him an inherent opportunity to withhold unfavorable information or to supply bogus documents. In contrast, a surprise inspection of the physical conditions in the working mine provides a more reliable measure of compliance because overt violations of health and safety standards cannot be readily concealed in a matter of minutes. It therefore represents a more effective deterrent to sharp practices.

We conclude that Section 813(a) and (b) must be read to authorize federal investigators, as part of periodic investigations in coal mines, to enter mine offices in which they reasonably believe that evidentiary indicia of compliance are maintained and to retrieve these materials by searching areas in which it is likely that they will be found. Intrusions of this scope may only be undertaken pursuant to valid search warrants. The remaining question is what measure of prob-

able cause should be applied by a judicial officer in deciding whether to issue such warrants.

At the outset we stated our belief that the six searches fell within the ambit of routine investigations sanctioned by Section 813. Nothing within the record militates to the contrary. The premises searched were permissible investigative targets because there was ample reason to surmise that they would be repositories of evidence of compliance (or non-compliance) with the requirements of Section 842. The searches were accomplished during normal working hours so that forced entry or destrication of property was avoided. The scope of the intrusions *within* the offices was apparently limited to locales where pertinent records and dust sampling cassettes might be stored. No factor cited by the Appellees convinces us that the searches were an administrative ruse to justify unbridled, exploratory forays for evidence of *any* criminal infraction. The warrants themselves strictly limited the items which could be seized to those related to activities which would not have been engaged in by the Company but for the demands of Section 842.

In recognition that the proposed searches were sanctioned by the Act, the warrant applications should have been tested for constitutional sufficiency against an administrative standard of probable cause. *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), *Brennan* v. *Gibson Products, Inc. of Plano*, 407 F. Supp. 154 (E.D. Texas 1976). This is a "flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." *See* v. *City of Seattle*, 387 U.S. at 545. Here the public need, recognized as "urgent" by Congress in the preamble to the Act, is the promotion of the "health and safety of [the coal mine industry's] most precious resource – the miner," 30 U.S.C. § 801(a). The demands of effective enforcement, which may prevent needless injury, disability or death, outweigh the "historic interests of 'self protection'" which would otherwise come into play when the

inspector asks "that a property owner open his doors to search for 'evidence of criminal action' which may be used to secure the owner's criminal conviction." *Camara* v. *Municipal Court of the City and County of San Francisco, supra* at 530.

The basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite in this context. *See Camara* v. *Municipal Court of the City and County of San Francisco, supra* at 535. The scope of the searches became no broader because they were predicated on criminal suspicions than they would have been if justified by administrative exigencies. The magistrate would have been correct in issuing the warrants even if the investigators had only alleged a pattern of disparity between ambient dust levels reported by the Company and those visually observed during routine inspections. To deny warrant applications solely because criminal probable cause is lacking would frustrate compliance review and defeat attainment of the policy objectives of the Act. Where a search is routinely permissible on an administrative basis, it would indeed be anomolous if we were to raise the threshold probable cause requirement when the Government presents concrete evidence of irregular conduct by the mine operator. "If a valid interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

Our conclusion is bolstered by the fact that the coal mining industry has a history of close federal regulation under the aegis of the Commerce Clause. *See Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. at 49 & n. 3. Therefore, it is reasonable to assume that mine operators have a reduced expectation of privacy in their business offices than less highly scrutinized enterprises. *See generally Katz* v. *United States*, 389 U.S. 347 (1967). They have virtually no expectation of privacy in records and paraphernalia which they exclusively maintain in compliance with the Act. *Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. at 51 n. 5.

Therefore, the quantum of probable cause required to sustain the searches here need not be as great as it might have to be if the same intrusions were contemplated in a less regulated industry.

The Supreme Court has permitted substantial intrusions within federally licensed commercial premises *without* a warrant where "regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions," *United States* v. *Biswell*, 406 U.S. 311, 317 (1972). These routine, unannounced inspections have been authorized by federal statutes similar in scope and purpose to the Act in that they invoke the police power to protect the public welfare. *Colonade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).[11] Although investigative searches of mine operator records may exceed the scope of judicially condoned warrantless inspections, we do not believe that the difference is sufficiently great to warrant a quantum leap to a criminal probable cause standard. An administrative showing should suffice to protect the legitimate privacy expectations of mine operators.

We question the practicality of imposing a double standard of review where search warrant applications are in furtherance of Section 813 investigations. If the Government's burden of pursuasion significantly increases when it candidly discloses its criminal leads, it will have incentive to withhold this information by couching all of its warrant requests in terms of administrative necessity. In those cases in which criminal suspicions are invoked by the proffered administrative rationale, the magistrate may find it exertmely difficult to select the appropriate standard of review. Any investigation initiated to secure compliance with the Act has potential criminal overtones. Section 819 makes willful noncompliance or fraud

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[11] The constitutionality of inspections of commercial premises without a warrant under Section 657 of Occupational Health and Safety Act of 1970, 19 U.S.C. § 651 *et seq.*, is current before the Supreme Court in the case of *Marshall* v. *Barlow's Inc.*, No. 76-1143, 21 CRIM L. REP. 4021 (April 20, 1977).

criminally actionable. Prosecution of all infractions is not a foregone conclusion, however, because the Secretary has inherently broad discretion to bypass criminal sanctions in favor of civil penalties. In the context of regulatory enforcement, we are loath to attribute conclusive legal significance to the apparent focus of an investigation. The magistrate's task will be expedited and the opportunity for reversible error substantially reduced if all Section 813 search warrant applications are subject to a uniform, administrative standard of review, whether or not criminal violations of the Act are suspected.

We need not dwell on the subtleties of the Government's two supporting affidavits to satisfy ourselves that they provided sufficient administrative probable cause to issue the six search warrants. Read together under the authority of *United States* v. *Serao*, 367 F.2d 347, 349 (2nd Cir. 1966), the affidavits vividly describe an ex-employee's personal involvement in a system implemented by the Company to defeat the regulatory intent of Section 842 of the Act.[12] The informant's statements to federal authorities recount other information supplied to him by two identified co-workers who also admit their participation in the scheme. Through the informant, these technicians allege that the illegal practices, in which they play a key role, are common to a number of Company mines, including the locations actually searched. In addition, one of the affiants, a federal mine safety inspector, describes recent observations, made by him in one of the Company's mine offices, which tend to confirm the continuing nature of the violations.[13]

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[12] The two affidavits were formally submitted in support of only one warrant application. The other five applications exclusively relied upon one of the two affidavits, although all of the applications were *contemporaneously* presented to the magistrate for review. Under *Serao*, we believe we are justified in concluding that the magistrate was privy to the information contained in both affidavits before ruling on any of the related applications.

[13] The inspector saw a posted list of "voided" sampling cassettes and a brown book in one of the suspect mine offices during a routine inspection. Both of these items were described by the informant as instrumental in the illegal scheme.

To a reasonably prudent person this information suffices to implicate the Company and a number of its employees in a course of conduct intended to compromise the working conditions of its miners. Indications of such flagrant non-compliance demand a prompt administrative response, even in the absence of criminal violations. Where the physical well-being of hundreds of miners may be jeopardized if warrants are denied, we remain unconvinced that a confidential informant's tip must be subjected to an *Aguilar-Spinelli* analysis of reliability. The legal basis for this seems particularly suspect in this case where the informer is an ex-employee of the mine operator. The Act expressly authorizes a "representative of the miners" who "has reasonable grounds to believe that a violation of a mandatory health or safety standard exists" to obtain an immediate inspection by giving appropriate written notice. 30 U.S.C. § 813(g). The informant here served as the putative miner's representative who provided these "reasonable grounds." Therefore, the magistrate properly granted the warrant requests.

We conclude that the district court erred in failing to perceive the administrative character of the search warrants. By resorting to an overly restrictive standard of review, the court failed to give effect to the policy objectives of the Act. We hold that warrant applications submitted under the authority of 30 U.S.C. § 813 should be scrutinized under an administrative standard of probable cause. *See* v. *City of Seattle, supra.* As was done in this case, warrants actually issued should be carefully tailored, by limiting the items to be seized, to prevent the abuses inherent in "general, exploratory rummaging in a [company's] belongings." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971).

Reversed and remanded for further proceedings.

ENGEL, Circuit Judge, concurring.

While I find myself in general agreement with much of the majority opinion, certain issues relating to administrative searches and seizures covered therein are sufficiently troublesome to persuade me that we should save their resolution until the case arises which demands it. Since I am fully satisfied that the government's affidavits meet the more stringent standards of *Aguilar* and *Spinelli* and since this is sufficient to uphold the search and seizure in any event, I concur in reversal and remand.

APPENDIX B
No. 76-2521

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA)

Plaintiff-Appellant,)

v.) ORDER

FRANCIS LEO MARKS,)

Defendant-Appellee,

Before: CELEBREZZE and ENGEL, Circuit Judges, and CECIL, Senior Circuit Judge.

Appellee filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman
Clerk

FILED Aug. 29, 1977
JOHN P. HEHMAN, CLERK

APPENDIX C

SUPREME COURT OF THE UNITED STATES

NO. A-289

FRANCIS LEO MARKS,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1977.

s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 19th 26th day of September, 1977.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Ohio
Eastern Division

United States of America, Plaintiff v. Darrell Hazelwood, et al., Defendants	Criminal Case No. 75-97

Memorandum and Order

Defendants Consolidated [sic] Coal Company (hereinafter "Consol") and eight of its agents and employees[1] are variously charged in a 172-count indictment with conspiring to defraud the government and to violate the Federal Coal Mine Health and Safety Act in violation of 18 U.S.C. §371; with knowingly making false statements and representations in "mine data cards" filed with the Department of the Interior in violation of 30 U.S.C. §819(d); with willfully violating specified mandatory health standards in violation of 30 U.S.C. §819 (b); and with knowingly authorizing, ordering, and carrying out violations of the mandatory health standards by Consol in violation of 30 U.S.C. §819(c). On September 12, 1975, defendants entered pleas of not

1. The individually named defendants are Darrell Hazelwood, Francis Leo Marks, Raymond J. Zitko, Robert Lasick, Richard Schrickel, Samuel Kirkland, Paul R. Kidney and James Kull.

guilty to all counts. Defendants Consol, Raymond Zitko, Paul R. Kidney and Robert Lasick move the Court for an order suppressing various items of property taken pursuant to warrants from certain buildings and mines belonging to Consol. Materials were seized from the following eight locations:

1. The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio;

2. The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

3. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;

4. The mine office, Ross Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio;

5. The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

6. The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio;

7. The Reclamation Services Mine 60 office, a white single story wooden building of Consolidation Coal Company, about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

8. The environmental building, a white building of Consolidation Coal Company, located about 225 feet from Ohio State Route 9, approximately 3 miles south of Cadiz, Harrison County, Ohio.

Since the government has represented that it will not use materials seized at two of the locations — — the Reclamation Services Mine 60 office and the environmental building — — the Court considers the motion to suppress as to the searches at these two locations to be moot.

Further, the Court will at this time only consider the motion to suppress of defendant Consol. Three individual defendants, Raymond Zitko, Paul R. Kidney, and Robert Lasick have moved to join in Consol's motion which requests the government challenges, asserting that these defendants lack standing by failing to be a "person aggrieved" within the meaning of Rule 41, Fed. R. Crim. P. See also *Jones* v. *United States,* 362 U.S. 257, 261 (1960) wherein the Supreme Court of the United States stated, "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." When the standing of a defendant is challenged, the burden is upon him, to establish his right to challenge the legality of a search, see *Jones* v. *United States,* 362 U.S. at 261. Since the defendants have not replied to the government's challenge to their standing and hence no facts have been brought forth, the record is simply not sufficient at this point in the proceedings for the Court

to rule on a motion to suppress by these defendants. Accordingly, the motion to suppress of Raymond Zitko, Paul R. Kidney and Robert Lasick is DENIED without prejudice.

The nine warrants involved herein were issued upon the affidavit of Mr. William A. Holgate, a health specialist employed by the Mining Enforcement and Safety Administration. In addition, one of the nine warrants, namely that used to search the premises at the Franklin No. 25 Mine, was also supported by the affidavit of Mr. Thomas Jeskey, a Federal Mine Inspector also with MESA. The Court will first consider the validity of the searches conducted solely upon the Holgate affidavit and then consider that of Franklin No. 25 Mine based upon both affidavits.

I

The Holgate affidavit states as follows:

William A. Holgate, U. S. Department of the Interior, Washington, D. C., being duly sworn according to law, deposes and says:

1. I am a health specialist, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.

2. On May 15, 1974, I went to St. Clairsville, Ohio, where I met with an individual who had been employed by Consolidation Coal Company, at the Franklin No. 25 mine, and Franklin Highwall mine, located in or near New Athens, Harrison County, Ohio. Said individual informed me that he spoke with personal knowledge.

3. Said individual stated to me that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. He stated that he was instructed by his superiors to maintain a supply of extra cassettes which contained respirable dust samples collected under controlled conditions. These samples were collected on idle shifts and they do not represent the actual mining environment in which miners were actually working.

4. He further stated that he was instructed to send all cassettes actually collected in the respirable dust program to the Company's laboratory in Georgetown, Ohio. Jim Kull and Scot McNickles, technicians at this laboratory would open the cassettes and weigh the capsule containing the dust sample. If the sample weighed in excess of the permitted weight, either the sample would be voided or the inner capsule would be opened and an amount of the respirable dust would be discarded. If the sample was voided, a "controlled" or fictitious sample would be substituted. In submitting the substitute samples, the mine data cards which are required to be submitted to Mining Enforcement and Safety Administration along with the cassettes would bear the forged signature of the miner allegedly sampled.

5. Said individual also stated that a record indicating the cassette numbers of all samples actually collected and those samples which were voided was maintained on a bulletin board in the environ-

mental office at the mine. He further stated that a brown book containing a listing of voids and of "fictitious" samples was maintained and kept in a desk drawer in said office, and that the actual "fictitious" samples were kept in a drawer in said office.

6. Said individual also stated that Jim Kull and Scot McNickles told him that similar practices were employed at other mines in the Central Division, Consolidation Coal Company.

7. From the information obtained, affiant believes that the above-described books, records, and fictitious samples are being kept at the environmental office of said mines and that said articles would show that agents of the operator knowingly ordered or carried out violations of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. Affiant further believes that such books, records, and fictitious samples would show that false statements, certifications, or representations were knowingly made in records or reports required to be filed or maintained pursuant to said Act and regulations promulgated thereunder.

As is apparent from a reading of the affidavit, the informant's tip is a necessary and crucial element in the finding of probable cause. Its sufficiency, therefore, must be judged under the two-pronged test first articulated by the Supreme Court in *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and subsequently explicated by later decisions. The *Aguilar* affidavit stated in relevant part that:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic

> paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law.

The Supreme Court found that the *Aguilar* affidavit was phrased in general, conclusionary terms and failed to furnish a basis upon which a neutral and detached magistrate could "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." *Aguilar* v. *Texas,* 378 at 114. The Court then proceeded to articulate two factors which it considered to be essential if an affidavit was to pass constitutional muster:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'

The Supreme Court found the affidavit in *Aguilar* wanting because it did not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." Id. at 113.

In *Spinelli* v. *United States,* 393 U.S. 410 (1969), the Supreme Court again considered the constitutional sufficiency of a supporting affidavit[2] for a search warrant.

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2. The affidavit in *Spinelli* stated:

> I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.
>
> That on August 6, 1965, at approximately 11:44 a.m., William Spinelli was observed by an Agent of

The *Spinelli* affidavit told of FBI surveillance of seemingly innocent activity and then simply stated the FBI was "informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of telephone which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." The informant's tip was found to be constitutionally insufficient

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the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a.m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p.m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3-649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p.m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking

under the *Aguilar* standards. Although the affiant had sworn the informant was "reliable," no basis had been provided in the affidavit to support this conclusion and thus there was no way for a magistrate to form his own neutral and detached appraisal. Nor, said the Court, was the other test of *Aguilar* satisfied. The affidavit did not contain a statement of the underlying circumstances from which the informant had come to his conclusion that Spinelli was engaging in a bookmaking operation.

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lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a.m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p.m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the

There was no way of knowing how the informant had obtained any information regarding Spinelli; no indication, for example, that he had ever personally observed the alleged bookmaking operations. Since the remainder of the affidavit also failed to support a finding of reliability for the informant, the Supreme Court concluded, as it had in *Aguilar*, that there was no basis for a finding of probable cause.

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southwest corner, known as Apartment F, of the two-story apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p.m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F.B.I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.

While *Aguilar* and *Spinelli* furnish examples of affidavits held to be insufficient, *United States* v. *Harris*, 403 U.S. 573 (1971), analyzes an affidavit found to provide a basis for a magistrate's determination of probable cause. In *Harris* the Court again grappled with "the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity." *United States* v. *Harris*, 403 U.S. at 575. The warrant in *Harris* had been issued upon an affidavit which stated:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in

> the outbuilding known as and utilized as the 'dance hall,' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

Reading the above statement in light of the *Aguilar* requirements that there be a factual basis for both the informant's information and his credibility or reliability, several factors are present in it which were not present in the *Aguilar* and the *Spinelli* affidavits. First, the informant had personal and recent observations of the criminal activity involved, showing that the informant had acquired the information in some reliable fashion. Moreover, there is also present a substantial basis for judging the reliability of the informant. The "substantial basis" approach for determining whether hearsay in an affidavit should be credited was first articulated in *Jones* v. *United States,* 362 U.S. 257 (1960). As the Supreme Court noted in *Harris*: "In determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, *Jones* v. *United States*[3] is a suitable benchmark." The

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3. The *Jones* affidavit was as follows:

> Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.
>
> This same information, regarding the illicit narcotic traffic, conducted by [the defendant] has been given to the undersigned and to other officers of the narcotic squad by other sources of information.
>
> Because the source of information mentioned in the opening paragraph has given information to the

Court found a substantial basis for crediting the hearsay in *Jones* because the informant had previously given accurate information, his story was corroborated by "other" sources, and the defendant was a known (by the affiant) user of narcotics. In *Harris* a substantial basis was found because again the informant was relating personal observations, there was corroborating information within affiant's own knowledge, and there was the additional factor that the informant's statements were against his penal interest.[4] Because there was in the affidavit some explication of the "underlying circumstances" of the informant's information and of his reliability, the Court concluded that a magistrate could properly find probable cause for the issuance of a warrant.

Turning now to the affidavit in the instant case, I first consider whether there exists on the face of the affidavit a factual basis to establish the informant's credibility or reliability. The government argues that the credibility of the informant is established in two ways. First, according to the government, the informant is making declarations against his penal interest. Although as noted above, statements against penal interest were the subject of discussion in the *Harris* decision, it is important to note that this additional factor of reliability was credited by only four of the five justices

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undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [sic] in the above apartment.

4. It should be noted that only four of the five justices who joined in the majority opinion concurred in finding this an additional factor of reliability.

who joined in the majority opinion. Therefore this Court hesitates to find such a factor a significant indicia of reliability absent other compelling factors. More importantly, however, the Court does not read the declarations of the informant to be in fact against his penal interest. The informant merely states that he was instructed to do certain things ("to maintain a supply of extra cassettes which contained respirable dust samples collected under controlled conditions"; "to send all cassettes actually collected in the respirable dust program to the Company's laboratory"). There is no admission that the informant actually participated in any illegal activity. Accordingly, even assuming a declaration against interest is a factor of reliability, I do not find it to be present in the Holgate affidavit.

The government next contends that the detail of the informant's information is an indicator of his reliability. Such a factor was found significant in *Draper* v. *United States,* 358 U.S. 307 (1959). In *Draper* the informant had described "with minute particularity" the physical appearance and the activities of the party searched. *Spinelli* v. *United States,* 393 U.S. at 417. Additionally, the agents had personally verified each of the details of the information except that Draper possessed the alleged heroin. This Court does not believe that the Holgate affidavit contains the detail of information relied upon by the Court in *Draper*. Nor is there independent corroboration by affiant Holgate as to any information provided by the informant. The Court concludes, then, that the factors of reliability of the informant asserted by the government do not exist. Nor is the Court able to find any other basis for concluding the informant is reliable. He apparently was not known to the affiant and had not previously provided reliable information.

Turning now to the question of whether the Holgate affidavit contains a factual basis for the informant's information, I first note that the informant purports to speak with personal knowledge. However, there is some difficulty determining what parts of the affidavit are based upon personal knowledge. Certainly it is clear that the relating of the instructions to the informant himself stem from personal knowledge. It is not so clear, on the other hand, how the informant comes by the information concerning Jim Kulls and Scot McNickles' activities; or how he came by his information regarding the record of the voided samples and the listing of void and fictitious samples in a brown book. Although the affidavit indicates that the informant "had been employed by Consolidation Coal Company" there is no indication at what time period the informant was employed at Consol. Consequently, there is no way to determine whether the information is "fresh," so to speak, or "stale." Further, informant's employment, whenever it was, was at Franklin No. 25 mine, and the affidavit was used to obtain search warrants for various other mine facilities. In this regard, the affidavit merely states that "said individual [the informant] also stated that Jim Kull and Scot McNickles told him that similar practices were employed at other mines in the Central Division, Consolidation Coal Company." No factual basis is set forth as to how Kull and McNickles came by this information or as to the reliability or credibility of Kull and McNickles. In short, then, there is only a general, conclusionary statement similar to that found defective in *Aguilar*.

It is perhaps appropriate to comment upon one final problem presented by the Holgate affidavit. The very heart of the alleged illegal activity is to be found in para-

graph 4. Yet this paragraph clearly points up the defects of the affidavit as a whole. There is no indication how the informant came by his information regarding the activities of Kull and McNickles. Moreover, assuming it was from these two individuals, it is necessary that there be some basis for determining the reliability of Kull and McNickles. Because the Holgate affidavit fails to explicate the "underlying circumstances" of the informant's information and of his reliability, this Court concludes that it did not furnish probable cause for the issuance of the warrants used to search the following premises:

1. The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

2. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;

3. The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio;

4. The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

5. The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio.

Accordingly, the property seized from the above premises must be suppressed.

II

The Court will now turn to a consideration of the search of the office of Franklin No. 25 coal mine which as noted above was based upon the affidavit of Thomas Jeskey in addition to the affidavit of William Holgate. The Jeskey affidavit states as follows:

> Thomas A. Jeskey, U. S. Department of the Interior, St. Clairsville, Ohio, being duly sworn according to law, deposes and says:
>
> 1. I am a Federal Coal Mine Inspector, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.
>
> 2. On May 15, 1974, I attended a meeting at St. Clairsville, Ohio, between representatives of the United States Department of the Interior and an individual who had been employed by Central Division, Consolidation Coal Company, Franklin No. 25 mine, located in or near New Athens, Harrison County, Ohio.
>
> 3. Said individual stated in my presence that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969. Said individual stated that these practices include the removal and "voiding" of actual cassette samples and the substitution of fictitious samples. Said in-

dividual further stated a record of the cassette numbers of samples collected but voided was maintained on the bulletin board at the environmental office of said mine. He further stated that a brown book containing a listing of the voided and of fictitious samples was maintained and kept in a desk drawer in said office.

4. On May 16, 1974, acting upon the information contained in the preceding paragraph, I proceeded to the site of said mine and at approximately 7:00 a.m. I met Mr. Frank Kolat, federal coal mine inspector in the environmental office of the mine. A short time later Mr. Sam Kirkland, the environmental technician for the mine, entered this office. The environmental office of said mine is made available to federal mine inspectors for their use when they are present to conduct an inspection of the mine.

5. After I had talked with Mr. Kirkland for a short period he left the environmental office to go about his duties. In his absence I observed at least six separate sheets of paper on the bulletin board. Attached as Exhibit No. 1 is a Xerox copy of a list which had been supplied by the former employee of the said mine. The lists I observed on May 16 on the bulletin board in the environmental office of said mine were substantially identical in form and similar in content to Exhibit No. 1. These papers listed respirable dust cassettes apparently used in said mine by identification number, date, and weight of sample. These listed at least six cas-

sette numbers as "void," namely, 15684738, 15743878, 15744164, 15744264, 15744170, and 15744071.

6. Before accompanying Mr. Kolat and me on the inspection of the mine, Mr. Kirkland returned to the environmental office. At that time I observed him remove from the desk in that office a hard bound book, approximately 3 inches by 6 inches in size, and stuff it in the front of his coveralls. He did not tell me what the book contained and I did not ask him. Mr. Kirkland then accompanied Mr. Kolat and me on the mine inspection.

7. At approximately 1:30 p.m. after completing the mine inspection, I left the mine premises.

The inquiry for the Court is whether these two affidavits together meet the tests of *Aguilar* and its progeny discussed above. The government argues, and the Court believes correctly so, that a basis exists for crediting the reliability of the informant. Such a basis arises from Mr. Jeskey's corroboration of certain items of information provided by the informant. The informant's information as to the existence of sheets listing void samples and of a book listing void and fictitious samples was verified by the independent personal observation of Mr. Jeskey who can then be said to have verified the credibility of the informant. The idea here is that having been shown to be reliable about some facts it is reasonable to assume he will be reliable regarding other facts. See *Draper* v. *United States,* 358 U.S. 307 (1959). Although the court believes this to be a close question, it nonetheless deter-

mines that a sufficient basis does exist for concluding that the informant is credible.

An even more difficult question exists concerning the reliability of the information contained in the affidavits; that is, do the affidavits contain some of the "underlying circumstances" from which the informant concluded that a practice existed to tamper with dust sample cassettes required to be submitted to the Mining Enforcement and Safety Administration. Although it is stated that the informant had been employed at Franklin No. 25 mine, as noted above, there is no indication at what period of time this employment occurred and thus this fact is of no real aid in judging the reliability of the information. The informant's information as to what his superiors told him can be credited but these facts standing alone do not furnish probable cause. Certain other facts were corroborated by Mr. Jeskey, but again, these facts do not, standing alone or in tandem with the information as to the instructions from informant's superiors, establish probable cause. Although obtained in a seemingly reliable fashion, this information is neutral, having no probative effect on whether any alleged illegality was in fact occurring. In this respect these facts may be likened to those contained in the *Spinelli* affidavit detailing the FBI's surveillance of seemingly innocent activity on the part of Spinelli. See *Spinelli* v. *United States,* 393 U.S. 410, 420-422 (1969). As the Supreme Court observed: "[T]he allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves — — and they are not endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli* v. *United States,* 393 U.S. at 418.

The crucial part of the affidavits is the relating of the activities of Kull and McNickles at the Georgetown laboratory and, as discussed above, there is simply no indication as to how this information was obtained. Informant did not state he personally observed these activities, and there is no indication that Kull and McNickles personally told the informant about their activities; even assuming that they did, a myriad of different problems would arise regarding the reliability of these individuals. The Court concludes, then, that the search of Franklin No. 25 mine must also fail and the results obtained therefrom must be suppressed.

Finding as I do, for the reasons stated in the above memorandum, that the respective affidavits used for the searches involved herein fail to establish probable cause, it is ORDERED that the motion for suppression submitted by Consolidation Coal Company be, and it hereby is, GRANTED.[5]

Robert M. Duncan, Judge
United States District Court

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5. Because of the result reached today, the Court does not believe any necessity exists for dealing with the issues of procedural irregularity under Rule 41, Fed. R. Crim. P. raised by Consol's motion. Should a need subsequently arise for consideration of these matters, a hearing can be held at some time prior to the date of trial.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America, Plaintiff v. Darrell Hazelwood, et al., Defendants	Criminal Case No. 75-97

Memorandum and Order

The government has moved for reconsideration of this Court's Memorandum and Order of June 11, 1976, granting defendant Consolidated [sic] Coal Company's motion to suppress evidence. The government presents three grounds for reconsideration. The Court has previously ruled that the affidavits of Messrs. Holgate and Jeskey are not sufficient to pass constitutional muster under the two-prong test of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969). Even if the two affidavits are read in tandem, as urged by the government, the Court concludes that the affidavits fail to establish probable cause for the issuance of the warrants.

The government has raised the additional ground for reconsideration that the searches and seizures of the various offices are authorized without warrants by the Federal Coal Mine Health and Safety Act, 30 U.S.C. §813(a). The government also argues that even in the

absence of probable cause, the exclusionary rule should not be applied in light of the good faith of the federal agents in obtaining and executing the search warrants.

Although the Federal Coal Mine Health and Safety Act authorizes certain warrantless searches as regulatory exceptions to the Fourth Amendment, these exceptions are limited to the specific authorization of the statute. *United States* v. *Biswell,* 406 U.S. 311 (1972); *Youghiogheny and Ohio Coal Company* v. *Morton,* 364 F. Supp. 45 (S.D. Ohio 1973). Warrantless searches are *per se* unreasonable subject to a few well delineated exceptions. *Katz* v. *United States,* 389 U.S. 347 (1967). In *Youghiogheny* the court limited the scope of the regulatory exception to searches "directly related to ensuring compliance with the purpose of the legislation." 364 F. Supp. at 50, n.4. The court further found an expectation of privacy outside the permissible scope of warrantless searches in the offices on the mine property, and that "the Act does not authorize these inspectors to rummage in any wholesale way or to initiate a general search of the mine operator's offices" for the records required to be kept under the Act. 364 F. Supp. at 51 n.5. This Court finds that these searches are not within the regulatory exception of 30 U.S.C. §813(a). It appears that the searches were undertaken in preparation for criminal prosecutions and not incident to the purpose and within the scope of the Act.

The good faith of federal agents does not cure a violation of the Fourth Amendment. Although the exclusionary rule has, as one of its purposes, the discouragement of improper police conduct, it has also as a purpose the prevention of a criminal conviction based upon illegally obtained evidence. The prevention of prejudice

to the defendant is of at least equal importance with the deterrence of improper police conduct. See, *United States* v. *Karatharos,* 531 F.2d 26, 32-34 (2d Cir. 1976).

For these reasons it is ORDERED that the motion for reconsideration submitted by the government be, and it hereby is, DENIED.

Robert M. Duncan, Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America, :

Plaintiff :

-v- :CRIMINAL CASE NO.
CR-2-75-97

Darrell Hazelwood, et al.,:

Defendants :

MEMORANDUM AND ORDER

On June 11, 1976, the Court granted Consolidated Coal Company's motion to suppress evidence. At that time the motions to suppress by the individual defendants were denied without prejudice for a failure to establish standing by showing that they were "aggrieved persons" within the meaning of Rule 41, Fed. R. Crim. P. Seven of the eight individual defendants have now refiled motions to suppress the evidence seized by the government at various locations on May 22, 1974. The Court having already determined that the affidavits before the magistrate fail to establish probable cause for the issusance of the warrants, the only question before the Court at this time is the standing of the individual defendants to raise their Fourth Amendment claims.

The government concedes that defendants Schrickel and Lasick have standing to seek suppression of the evidence seized from their respective offices. Although it appears that these defendants share their offices, that fact does not defeat standing. See Mancusi v. DeForte, 392 U.S. 364 (1968). The motions of defendants Schrickel and Lasick to suppress this evidence are therefore GRANTED.

The government also concedes the standing of defendants Marks and Zitko as to their respective offices. Defendants Marks and Zitko seek to suppress evidence seized at five mine offices of environmental technicians in addition to the evidence seized at their personal offices at the Georgetown General Office. Each defendant claims supervisory responsibility over the personnel and records of the various environmental offices in the ordinary course of their employment and dealt with the preparation and use of the records seized. This distinguishes this case from United States v. Britt, 508 F.2d 1052 (5th Cir. 1975) where the defendant's only relationship to the records was as president of the corporation. The nature of these defendant's employment required that their duties be performed at each of the various offices. Thus, even though the other offices searched were not the personal offices of defendants Marks and Zitko, and even though they were not present at the time of the search, they have demonstrated a reasonable expectation of privacy with respect to the evidence seized at these locations. They have an interest sufficient to support their standing to seek suppression of the evidence seized at each of the other five mine offices listed in their motions. The motions to suppress evidence of defendants Marks and Zitko are therefore GRANTED.

Defendant Kull alleges as the basis for his standing to move for suppression of evidence that he had contact with respirable dust samples at Consolidation Coal mines "for a few days when Scott McNickle was on vacation." He further states that he had an office at the environmental building and that "he may have used" an analytical scale kept at the mine offices. The defendant Kull has standing with respect to his own office in which he ordinarily performs the duties of his employment. Mancusi v. DeForte, 392 U.S. 364 (1968). Defendant Kull's motion is therefore GRANTED with respect to any items seized from this office. Defendant Kull has failed to establish the requisite nexus with any of the items seized at the various other mine offices.

He was not present at the time of the searches and his casual relationship to the items seized does not constitute a proprietary or possessory interest. Further it does not appear that possession of the seized evidence at the time of the contested search and seizure is an essential element of the offense charged. Brown v. United States, 411 U.S. 223, 229 (1973). Defendant Kull's motion as to the items seized at the other mine offices is therefore DENIED.

It appears from the record at the present state of these proceedings that defendants Hazelwood and Kidney were no longer employed by the corporate defendant, nor were they present at the time of the searches and seizures. Since they were no longer employed at Consolidation, these defendants cannot establish the requisite proprietary or possessory interest in the items seized to support standing. The indictment does not charge these defendants with possession of dust samples at the time of the search and seizure as an essential element of the offense. Brown, supra at 229. The motions of defendants Hazelwood and Kidney are therefore DENIED for want of standing as aggrieved persons.

The rulings made herein may be modified if further proceedings herein reveal that the facts are other than they appear from the record at this time.

It is so ORDERED.

s/ Robert M. Duncan
Robert M. Duncan, Judge
United States District
Court

APPENDIX G

Section 103 (30 U.S.C. §813) of the Federal Coal Mine Health and Safety Act of 1969.

INSPECTIONS AND INVESTIGATIONS—PURPOSES

(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

Right of entry of investigators

(b) (1) For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

(2) For the purpose of developing improved mandatory health standards, the Secretary of Health, Education, and Welfare or his authorized representative

shall have a right of entry to, upon, or through, any coal mine.

(3) The provisions of this chapter relating to investigations and records shall be available to the Secretary of Health, Education, and Welfare to enable him to carry out his functions and responsibilities under this chapter.

Utilization of facilities and personnel of other Federal agencies

(c) For the purpose of carrying out his responsibilities under this chapter, including the enforcement thereof, the Secretary may by agreement utilize with or without reimbursement the services, personnel, and facilities of any Federal agency.

Hearings; subpena; fees; contempt

(d) For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear

and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Notice of accident; preservation of evidence; supervision of rescue operations

(e) In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

Orders to insure protection of persons and property

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

Imminent danger notice; requisites; special inspection

(g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a

mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter.

Accompaniment right of representative of miners

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Hazardous conditions; spot inspections

(i) Whenever the Secretary finds that a mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine other especially hazardous conditions, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine

during every five working days at irregular intervals. Pub.L. 91—173, Title I, § 103, Dec. 30, 1969, 83 Stat. 749.

Section 108 (30 U.S.C. §818) of the Federal Coal Mine Health and Safety Act of 1969.

CIVIL ACTION FOR RELIEF; JURISDICTION AND VENUE; GROUNDS FOR INVOCATION OF REMEDIES; FORCE AND EFFECT OF ORDERS; REPRESENTATION OF SECRETARY

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders

shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Pub.L. 91—173, Title I, § 108, Dec. 30, 1969, 83 Stat. 756.

Appendix G.

Section 109 (30 U.S.C. §819) of the Federal Coal Mine Health and Safety Act of 1969.

PENALTIES—CIVIL PENALTIES FOR VIOLATIONS OF MANDATORY HEALTH AND SAFETY STANDARDS; HEARINGS; FACTORS DETERMINING ASSESSMENT; FINDINGS; APPLICABILITY OF SECTION 554 OF TITLE 5; PROCEDURES FOR ENFORCEMENT

(a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, except the provisions of subchapter IV of this chapter, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health and safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals

under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Willful violations or refusal to comply with health and safety standards by operators of mines

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 820(b)(2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.

Willful violations or refusal to comply with health and safety standards by corporate operators of mines

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under

this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b) (2) of this title, and any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

False statements or representations

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter or any order or decision issued under this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Distribution or sale of noncomplying components

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

Pub.L. 91—173, Title I, § 109, Dec. 30, 1969, 83 Stat. 756.